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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HUNG VAN MAI,

Defendant and Appellant.

G041566

(Super. Ct. No. 06WF0811)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John D. Conley, Judge. Affirmed.

David Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

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THE COURT:\*

In an amended information, appellant Hung Van Mai was charged with one count of murder in the death of an unborn child (Pen. Code, § 187, subd. (a)), and one count of evading a police officer while driving recklessly (Veh. Code, § 2800.2).) The jury found Mai guilty of second degree murder and evading a police officer, and it found true allegations he had personally inflicted great bodily injury on the mother and unborn child. In a bifurcated proceeding, the court found true Mai had suffered a prison prior and a strike prior. It sentenced him to 30 years to life.

On appeal, Mai argues the court prejudicially admitted evidence he was on parole and had cocaine in his system while he evaded the police, and he had violated parole in 2005 by using cocaine: “The court permitted the jury to consider the evidence to prove his motive for both offenses, his intent to evade for count two, and implied malice for count one. [] The evidence was not relevant to any of those issues [] and its probative value was substantially outweighed by its risk of prejudice.”

We find no error and affirm.

I

The facts are straight-forward and undisputed. At 2:44 a.m. on March 30, 2006, Mai was driving a black Lexus with the driver’s side window tinted black in violation of the Vehicle Code. A Garden Grove police officer attempted to pull him over but Mai turned off his lights and sped off with the officer, his lights and siren on, in pursuit. Mai was on parole, and he had been advised by his parole officer that drug use was a parole violation which would send him back to prison.

Mai led the officer on a high-speed chase on surface streets, periodically reaching speeds of 60 miles per hour. He also ran at least one red light. When he approached the Garden Grove Freeway at Harbor Boulevard he drove the wrong way up

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\* Before Sills, P. J., Moore, J., and Aronson, J.

the westbound off ramp and almost collided with a vehicle coming down it. He tried to make a U-turn at the top of the ramp and merge with freeway traffic but collided with a vehicle traveling westbound on the freeway at 60 to 65 miles per hour.

The driver of the other vehicle was able to escape from the vehicle with moderate injuries. But his passenger, who was seven months pregnant, was trapped under the glove compartment and had to be cut out. She was severely injured and her unborn child killed in the accident when her placenta ruptured.

## II

### A. *Evidence of Cocaine Use*

Prior to trial, Mai made a motion in limine to exclude evidence he had the metabolite of cocaine and cocaine in his system. The police had drawn Mai's blood a little over one hour after the accident. The prosecution wanted to introduce this evidence to show implied malice, an element of the murder count, as well as a motive for fleeing the police. Mai argued evidence of cocaine use was not relevant and would only confuse the jurors.

The court denied the motion, explaining, "I don't think that the use of cocaine is simply for motive, but it is part and parcel of implied malice." After citing *People v. Watson* (1981) 30 Cal.3d 290, it stated that, "even if there was no fleeing from the police but he turned up the wrong end going up the off ramp, that's part of implied malice. You were driving, you knew you had cocaine, and you knew you wouldn't be as good a driver as you normally are. [¶] So, I think it is admissible for motive, but it's really admissible as a key ingredient of what is implied malice." In *Watson*, the Supreme Court held under similar facts (there the defendant drove at excessive speeds on city streets while intoxicated, he nearly collided with another vehicle after running a red light, and he then collided with the victims' car) were sufficient "to uphold the second degree murder counts in the information, and to permit the prosecution to prove, if it can, the elements of second degree murder" on an implied malice theory. (*Id.* at p. 301; see also

*People v. David* (1991) 230 Cal.App.3d 1109, 1114 [consumption of illegal drugs may, in appropriate circumstances, prove implied malice sufficient to support a second degree murder conviction].)

On appeal, Mai all but ignores *Watson* and spends most of his effort trying to show the evidence of cocaine use was irrelevant to the issue of motive. The contention is unpersuasive. Mai's parole officer told him using drugs would violate the conditions of his parole and result in his return to prison. Knowing he had cocaine in his system and that the officer attempting to stop him would arrest him if he suspected as much, Mai acted on his motive to avoid the consequences of his drug use and flee the scene. Accordingly, Mai's motive to flee was relevant on the issue of whether he deliberately acted with conscious disregard for life. Put another way, Mai had a motive to disregard the risk of killing or injuring another as he fled the pursuing officer. The trial court therefore did not abuse its discretion in admitting evidence of motive.

In *People v. David, supra*, the defendant was convicted of second degree murder after he drove while under the influence of PCP and collided with the victims' vehicle, killing them. The appellate court explained: "Second degree murder on implied malice is shown when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that the conduct endangers the life of another and who acts with conscious disregard for life. Implied malice requires a determination that the accused actually appreciated the risk involved. A later case stated in more everyday language that the state of mind for implied malice is "I know my conduct is dangerous to others, but I don't care if someone is hurt or killed.'" [Citations omitted.]" (*People v. David, supra*, 230 Cal.App.3d at p. 1114.) In upholding the jury's verdict, the court recognized first that, "The criminal act underlying vehicular murder is not use of intoxicating substances in anticipation of driving, but is driving under the influence with conscious disregard for life." (*Ibid.*) In concluding the evidence there was sufficient, the court then stated, "Here appellant

several times crossed the double-double yellow center lines into oncoming traffic, forcing oncoming traffic out of its lanes to avoid a collision. Appellant had a near collision with a woman in a crosswalk with two children and a shopping cart. Appellant was pursued by a sheriff's vehicle with red light and flashing amber lights. From these events the trier of fact could infer appellant's awareness of the risk." (*Id.* at p. 1116.)

In this case, there was evidence Mai had ingested cocaine, was trying to elude a police officer, was speeding on surface streets at night with his lights out, had run at least one red light, had entered a freeway by going the wrong way on an off-ramp, barely avoided colliding with a vehicle coming down the off-ramp, and then had tried to make a U-turn in front of high-speed traffic going the other way. It is clear there was sufficient evidence to support the jury's finding of implied malice, and thus we see no abuse of discretion in admitting evidence of cocaine use on the murder count.

Finally, Mai argues evidence of cocaine use was irrelevant to the charge of felony evading (see Veh. Code, § 2800.2) because, as in the murder count, motive was not an issue. But this misses the point. Although the court never specifically ruled on the in limine motion as to the felony evading count, it is clear from the record it intended to deny it. Denial was proper because section 2800.2, subdivision (a) states it is a crime, "[i]f a person flees or attempts to elude a pursuing police officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property []." Although the "willful or wanton disregard" mental state necessary to convict a defendant for felony evading is not enough to convict a defendant for implied malice murder (see *People v. Calderon* (2005) 129 Cal.App.4th 1301, 1308 ["there is subtle [] difference between disregard for the *safety* of persons [in section 2800.2] and disregard for human *life*" [for implied malice]], the reverse is true; that is, evidence proving implied malice for murder is sufficient to prove willful or wanton disregard for the safety under section 2800.2. The reason is because an act dangerous to life that may result in death is an act in disregard for human safety. We therefore see no

abuse of discretion in admitting this evidence on the count for felony evading.

### B. *Evidence of Parole Status*

Mai also made a motion in limine to exclude evidence that he was on parole at the time of the crimes. Citing footnote 2 in *People v. Scheer* (1998) 68 Cal.App.4th 1009 at page 1020 [“Service of a prison term [and the defendant’s parole status] is highly probative to show a motive to flee apprehension for the current crime, i.e., to avoid service of future additional prison time”], the court here observed: “Normally we do everything possible to avoid bringing in that someone is on parole, because it is prejudicial.” But it denied the motion, and the separate request to exclude it under Evidence Code section 352, because, as it reasoned, Mai’s parole status was “a key factor in determining the motivation for fleeing police.” (See *People v. Durham* (1969) 70 Cal.2d 171, 189 [evidence of defendant’s parole status relevant to show motive for murder of police officer].)

On appeal, Mai concedes his parole status “may have tended to establish [his] motive to evade the police,” and such evidence, if relevant, is admissible. He asserts, however, that such evidence “is only relevant to the extent it tends to prove a fact of consequence that is in dispute” and that the trial court “failed to go beyond the tendency of the evidence to prove motive and ask whether motive tended to prove a disputed fact of consequence.” (See Evid. Code, § 210.) Mai then asserts that evidence of motive could only go to the issue of the identity of the perpetrator; and because Mai’s identity was always known motive was never an issue in this case.

But evidence showing a defendant’s motive can be relevant for more than the identity of the perpetrator. “Evidence that a defendant committed other crimes may be admitted when relevant to establish a motive for the commission of the charged offense or a common plan or design.” (*People v. McDermott* (2002) 28 Cal.4th 946, 999; see also Evid. Code, § 1101, subd. (b).) Here, evidence of Mai’s parole status went to explain why he chose to flee the police rather than receive a traffic ticket for illegally

tinted windows. As the Attorney General points out, “The prosecution’s theory for the second degree murder charge was that by fleeing the officer in the manner in which appellant fled, he exhibited a conscious disregard for human life. His motive for fleeing was highly relevant to the murder charge as well as the evading charge.” Such evidence was therefore relevant and properly admitted.

Mai then insists that even if relevant the evidence was more prejudicial than probative. (Evid. Code, § 352.) We see no abuse of discretion. Quoting *People v. Gionis* (1995) 9 Cal.4th 1196, the trial court pointed out that the purpose of section 352 is to exclude “evidence which uniquely tends to evoke an emotional bias against the defendant as an individual, and which has very little effect on the issues.” (See *id.* at p. 1214; italics omitted.) Evidence of Mai’s parole status was prejudicial in that it was damaging to his case; but assaying it against the standards laid down in *Gionis*, such evidence was properly admitted. It went directly to the relevant issues of the case, and the jury was entitled to know that Mai fled from the police in order to avoid being returned to prison.

### *C. Evidence of Prior Parole Violation*

On rebuttal, the prosecution sought to introduce evidence that in 2005 Mai had served a seven-month sentence for using cocaine. Much of the discussion on the admissibility of this evidence was first discussed in chambers. The court, however, then put the gist of the discussion on the record.

A psychologist had testified that Mai had a cognitive disability that left him functioning at the mental level of a seven- to an eleven-year old. The thrust of the expert’s evidence was that people like Mai do not understand or process prior events in their lives and cannot use the consequences of those prior events to make current decisions. The prosecution wanted to introduce evidence that even if Mai was not intelligent he had used cocaine before and had been sentenced to prison for that use in the past, thereby showing Mai did understand the consequences of his actions (i.e., use

cocaine, go to prison). This would explain why he fled from the police. Mai objected solely on the ground the evidence was more prejudicial than probative.

The trial court considered the prejudicial effect and then announced that the evidence would be permitted, “But in a very limited way. Just that not only had [the parole officer] informed the defendant that use of drugs could result in a probation violation, but there were two other, two prior incidences where in fact it had resulted in a parole violation and he had been sent back to state prison.” The parole officer then testified to these limited facts.

“The admission of evidence in rebuttal is a matter left to the sound discretion of the trial court. [Citation.] The court’s decision in this regard will not be disturbed on appeal in the absence of ‘palpable abuse.’ [Citations.]” (*People v. Hart* (1999) 20 Cal.4th 546, 653.) Mai had introduced evidence suggesting he had a problem with understanding the consequences of actions and his actions of driving dangerously on city streets and the wrong way up the freeway ramp could all be explained by this cognitive deficit. But by introducing such evidence, Mai opened the door to rebuttal evidence that would show he did understand the consequences of his actions. Evidence of his prior parole violation could show he could reason and understood the consequences of his actions. Under these facts, the trial court did not palpably abuse its discretion in admitting this evidence.

### III

The judgment is affirmed.